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No.

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1987

RICHARD WILDERMUTH,

*Appellant,*

*vs.*

COMMONWEALTH OF PENNSYLVANIA,

*Appellee.*

*On Appeal from the Supreme Court of Pennsylvania*

## MOTION TO DISMISS OR AFFIRM

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## COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether an elderly perpetrator, convicted of numerous sexual offenses against infants and sentenced under a mandatory sentencing statute, can be imprisoned where medical care is provided, without violating the prohibition against cruel and unusual punishment?

2. Whether the mandatory sentencing statute codified at 42 Pa.C.S.A. § 9718 is a rational exercise of legislative power where, in classifying serious sexual crimes against infants, there are no mitigating circumstances which warrant a sentence of less than five years imprisonment?

3. Whether there is a substantial federal question that warrants further argument where the Pennsylvania courts below properly held based upon state law that appellant's rights to equal protection were not violated since the state legislature made a reasonable classification in enacting 42 Pa.C.S.A. § 9718 that persons who commit certain sexual offenses against infants must serve a mandatory five year minimum sentence?

No.

In The

# Supreme Court of the United States

October Term, 1987

RICHARD WILDERMUTH,

*Appellant,*

*vs.*

COMMONWEALTH OF PENNSYLVANIA,

*Appellee.*

*On Appeal from the Supreme Court of Pennsylvania*

## MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16, moves the Court to dismiss the appeal herein, or in the alternative, affirm the judgment of the Supreme Court of Pennsylvania which dismissed the appellant's appeal as improvidently granted, thereby affirming the lower court's judgment of sentence, since it is manifest that the questions at issue are so insubstantial as to not warrant further argument.

## STATEMENT OF THE CASE

On November 15, 1984, appellant Richard Wildermuth, pleaded guilty to the following charges in which his victim was Melissa Cuikla, a six year-old girl: rape, 18 Pa.C.S.A. § 3121; statutory rape, 18 Pa.C.S.A. § 3122; involuntary deviate sexual intercourse, 18 Pa.C.S.A. § 3123; indecent assault, 18 Pa.C.S.A. § 3126; indecent exposure, 18 Pa.C.S.A. § 3127; and, corrupting a minor, 18 Pa.C.S.A. § 6301. At the same time, appellant pleaded guilty to the following charges in which his victim was Julia Green, a mentally retarded twelve year-old: statutory rape, 18 Pa.C.S.A. § 3122; indecent assault, 18 Pa.C.S.A. § 3126; indecent exposure, 18 Pa.C.S.A. § 3127; and, corrupting a minor, 18 Pa.C.S.A. § 6301.

In its pre-sentence investigation report, the Bucks County Adult Probation and Parole Department recommended that appellant be sentenced to five to ten years incarceration at the State Correctional Institution. This recommendation was made in light of the mandatory sentencing provisions which state that appellant must be sentenced to a mandatory five year minimum sentence, and could be sentenced to mandatory five year minimum sentences for each act of rape and involuntary deviate sexual intercourse against his infant victims.

Taking into account the mandatory sentencing provisions of 42 Pa.C.S.A. § 9718, the Honorable William Hart Rufe, III, of the Court of Common Pleas of Bucks County, sentenced appellant to two concurrent terms of five to ten years imprisonment in a state institution.

Appellant filed for modification of his sentence on the grounds that the mandatory minimum sentencing provision of 42 Pa.C.S.A. § 9718 as applied to him is cruel and unusual punishment and therefore violates the Eighth and Fourteenth

Amendments of the Constitution of the United States. By order dated December 7, 1984, Judge Rufe denied this motion and stated the reasons for doing so in an opinion filed February 14, 1985. Judge Rufe, after considering the nature and severity of the crimes at issue and the presumption of constitutionality that adheres to legislative enactments, stated that the imposition of a mandatory five year minimum prison term upon appellant is not cruel or unusual punishment:

> The crimes in question here, rape and involuntary deviate sexual intercourse, committed against [two] minor[s], are crimes of great severity and the legislature in enacting this statute expressed its grave concern for the protection of minors. Specifically, this act, is designed to punish those criminals who prey on the helpless children in our society.

Appellant's Brief at 14a.

Therefore, as Judge Rufe concluded, the "nature and severity of the crimes justify the legislature's rationally based minimum sentence." *Id.*

On December 12, 1984, following the denial of appellant's motion for modification of sentence, appellant appealed to the Superior Court of Pennsylvania. Appellant raised a plethora of constitutional challenges to 42 Pa.C.S.A. § 9718. The Superior Court found all appellant's claims to be meritless, upheld the constitutionality of Section 9718, and affirmed the lower court's judgment of sentence. Judge Frank Montemuro, writing for the Superior Court, stated that a statute will not be struck down unless its violation of the Constitution is so clear, palpable and plain as to preclude doubt or hesitation as to its validity (Appellant's Brief at 4a). Moreover, the court held that incarceration per se

is not cruel and unusual punishment and the appellant's assertion that his prison term violates the Eighth Amendment is without foundation. *Id.* at 8a.

On December 19, 1985, appellant petitioned the Supreme Court of Pennsylvania for allowance of appeal. At first, the Supreme Court of Pennsylvania granted the appeal, but on April 20, 1987, after full briefing and oral argument, the court dismissed the appeal as improvidently granted.

On April 27, 1987, upon consideration of the Supreme Court of Pennsylvania's order of April 20, 1987 which dismissed appellant's appeal as improvidently granted, Judge Rufe ordered the appellant to be taken into custody and transported to the State Correctional Institution at Graterford where he was to begin to serve his sentence. Only three days later, appellant filed this appeal to the Supreme Court of the United States. Upon notification of appellant's appeal to the Supreme Court of the United States, from the order of the Supreme Court of Pennsylvania issued on April 20, 1987, Judge Rufe rescinded his order of April 27, 1987, thereby staying the sentence of appellant pending this appeal. As of this writing, appellant is not in custody and has not served one day of his sentence which was imposed November 15, 1984.

## THE QUESTION IS NOT SUBSTANTIAL

### I.

**This Court has previously addressed the constitutionality of mandatory minimum sentences in *McMillan v. Pennsylvania*, ____ U.S. ____, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986). This Court has also held that conditions of confinement are not cruel and unusual punishment per se. *Rhoads v. Chapman*, 452 U.S. 337 (1981). Thus, where appellant argues that a mandatory term of incarceration is cruel and unusual because he is elderly, no substantial federal issue has been presented which has not been addressed heretofore.**

This Court has recently affirmed Pennsylvania's legislative power to enact mandatory minimum sentences. *McMillan v. Pennsylvania*, ____ U.S. ____, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986).

Mandatory minimum sentences are not cruel and unusual or unusually severe per se, *People v. Bullock*, 362 N.Y.S. 2d 682, 80 Misc. 2d 73 (1974), and mandatory minimum sentences may serve a substantial state interest. *Francioni v. Wainwright*, 650 F. 2d 590 (C.A. Fla. 1981). Such is the case with 42 Pa.C.S.A. § 9718, sentences for offenses against infant persons.

The particular factor made relevant by the statute, the age of the victim, has historically been considered to make an offense more serious and the punishment more severe. However, the mandatory five-year sentence does not increase the sentence required by statute or eliminate proof beyond a reasonable doubt for any element necessary for conviction. *Commonwealth v. Arnold*, 514 A. 2d 890 (Pa. Super. 1986). Age of the victim is a reasonable consideration for lawmakers. Pennsylvania has a substantial state interest in deterring crimes and protecting children in the Commonwealth.

Appellant argues that Pa.C.S.A. § 9718 is cruel and unusual as applied to him because he is elderly and has illnesses associated with aging. He argues that Pennsylvania's prison system is "ill-equipped" in having no specialized facility to treat organic brain syndrome. As appellant also suffers coronary dysfunction, he argues that his sentence is cruel and unusual punishment and "nothing less than a death sentence." (Appellant's Brief at 8). The Commonwealth disagrees with appellant's characterization of cruel and unusual punishment.

Since *Rhoads v. Chapman*, 452 U.S. 337 (1981), this Court has held that to the extent that such conditions of confinement are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society. *Id.* at 348.

Conditions of confinement are not cruel and unusual per se even where the prisoner is elderly. In a society where longevity has substantially increased in only a few decades, accepting appellant's argument would leave a huge segment of the population free to commit crime with impunity.

The Commonwealth argues that appellant's case can be likened to *State v. Trippiedi*, 499 A. 2d 239 (N.J. Super. A.D. 1985). In *Trippiedi* the defendant was sentenced under the Graves Act [N.J.S.A. 2C:43-6, subd. c], imposing a three-year period of parole ineligibility. Even though the defendant Trippiedi suffered from coronary artery disease, he was not subject to cruel and unusual punishment because medical care was available in the prison facilities. Likewise, appellant Wildermuth would have medical care available to him in prison.

While appellant argues that five years in prison would be tantamount to a death sentence, his physical condition could deteriorate in prison or at home. As the court noted in *Trippiedi*, it is even possible that treatment would be available faster in the prison. *Id.* at 241.

Appellant has not as yet been incarcerated. Nor has he alleged or proven gross deficiencies which would present a grave and immediate danger to him if incarcerated pursuant to his sentence. Therefore, appellant Wildermuth has not presented a cognizable Eighth Amendment claim.

## II.

**The Pennsylvania courts' decision that 42 Pa.C.S.A. § 9718 is not controlled by 42 Pa.C.S.A. § 9756 does not result in cruel and unusual punishment and as a state court interpretation of state law does not present a substantial federal question.**

The Pennsylvania courts concluded that the legislature had a rational basis for enacting § 9718 and a right to classify those crimes as having no mitigation which warrants a sentence of less than five years (Trial Court Opinion at 15a). The statute mandates a term of *imprisonment* upon conviction and limits judicial discretion to some extent. However, the court was not limited in considering mitigating circumstances in sentencing the related crimes concurrently. Therefore, appellant's argument that the court was completely precluded from considering mitigating circumstances is in error.

Appellant argues that the sentencing court did not consider confinement other than imprisonment and that because of this, appellant has necessarily been subjected to cruel and unusual punishment. In support of this contention, appellant cites 42 Pa.C.S.A. § 9756. Appellant contends that 42 Pa.C.S.A. § 9756 mandates the consideration of alternative methods of confinement. Appellant implies that § 9756 supersedes a newer law which clearly specifies imprisonment. This logic is erroneous.

The general sentencing statute, 42 Pa.C.S.A. § 9756, serves important notice and record functions. It requires the sentencing

court to specify any maximum sentence authorized as well as specifying where the sentence shall be served when imposing a sentence of confinement.

The Commonwealth maintains that 42 Pa.C.S.A. § 9718 serves a different purpose and operates in a manner separate and distinct from 42 Pa.C.S.A. § 9756. One statute addresses sentencing procedures generally while the other mandates the sentence to be imposed. The court has no discretion as to whether or not to impose a sentence of confinement or where the sentence shall be served because 42 Pa.C.S.A. § 9718 mandates imprisonment upon conviction of certain crimes. Therefore, the general sentencing statute is completely inapplicable where the sentencing court is addressing convictions subject to 42 Pa.C.S.A. § 9718.

While the lower courts did not specifically address the relationship between 42 Pa.C.S.A. § 9756 and 42 Pa.C.S.A. § 9718, the Pennsylvania Supreme Court allowed oral argument on this issue but later dismissed the appeal as having been improvidently granted.

Because § 9756 does not apply to § 9718 appellant argues he is subjected to cruel and unusual punishment. As such, appellant simply reiterates that a mandatory sentencing statute creates cruel and unusual punishment. Whether a mandatory sentence of imprisonment is cruel and unusual per se has been addressed and subsumed in Question Presented 1 *supra*.

## III.

**The question of whether 42 Pa.C.S.A. § 9718 as applied to appellant violates the Equal Protection Clause of the Constitution was properly decided by the Pennsylvania courts below and does not involve a substantial federal question that warrants further argument.**

The Superior Court of Pennsylvania and the Court of Common Pleas of Bucks County, Pennsylvania properly held that the Pennsylvania legislature did not violate the appellant's constitutional right to equal protection under the law. Therefore, the Supreme Court of Pennsylvania correctly dismissed appellant's appeal as improvidently granted.

The basic principles governing application of the Equal Protection Clause of the Fourteenth Amendment are familiar and well-settled. As explained in *Reed v. Reed,* 404 U.S. 71 (1971):

> In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. *Barbier v. Connolly,* 113 U.S. 27 (1885); *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61 (1911); *Railway Express Agency v. New York,* 336 U.S. 106 (1949); *McDonald v. Board of Election Commissioners,* 394 U.S. 802 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference

> having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Royster Guano Co. v. Virginia,* 253 U.S. 412 (1926); *Eisenstedt v. Baird,* 405 U.S. 441 (1972).

The standard of review for equal protection challenges has been equally well-settled in Pennsylvania since *Moyer v. Phillips,* 462 Pa. 395, 341 A. 2d 441 (1975). In fact, the standard is almost exactly the same as Supreme Court's mandate:

> [t]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike. *Id.* at 401, 341 A. 2d 443; *Commonwealth v. Wildermuth,* 501 A. 2d 258, 260 (Pa. Superior 1985).

In the instant case, the Pennsylvania courts' determination that 42 Pa.C.S.A. § 9718 does not violate appellant's right to equal protection properly followed the standards stated above, and rests upon adequate non-federal grounds. Therefore, no substantial federal question exists that warrants further argument.

Appellant alleges that § 9718 violates his right to equal protection in that the legislature failed to limit § 9718's applicability to offenders under sixty (60) years of age (Appellant's Brief at 13). Appellant would ask this Court to look at the mandatory sentencing provisions of 42 Pa.C.S.A. § 9717 (relating to offenses against elderly persons). He argues that § 9717 and § 9718 are almost identical except that § 9717 has an "age cap" in that the mandatory sentence of that section can only be applied to offenders under 60 years of age. *Id.* Appellant manufactures

an equal protection argument by contending that if his victims had been over 60 years old the mandatory sentence would not apply. The fault in appellant's contention is that the victims of his sexual offenses were not over 60 years old, but were only 6 and 12 years of age. Therefore, the provisions of § 9718, and not § 9717, apply to him.

The Pennsylvania state legislature, through § 9718, has expressed its outrage for sexual offenses, *i.e.*, rape or involuntary deviate sexual intercourse, committed against infants. It goes without citation that there is no denial of equal protection for a state legislature to impose a stricter sentence for some crimes than for others.

Although the mandatory sentencing provisions of § 9717 does not apply to him, appellant boldly asserts that the "age cap" included in § 9717 was designed to protect older offenders from mandatory imprisonment. Appellant submits that the legislature was "myopic" in not putting this purpose into § 9718 (Appellant's Brief at 15).

Appellant does not properly read § 9717. The purpose of § 9717 is not to protect elderly offenders from mandatory sentencing, but to sentence relatively youthful offenders to mandatory sentences for crimes committed *against* elderly persons. *Commonwealth v. Wildermuth,* 501 A. 2d 258, 260 (1985).

As the Superior Court stated:

> [w]e view the apparent legislative intent [of Section 9717] as being to protect older citizens rendered vulnerable as a result of their advanced age to certain crimes perpetuated by more youthful offenders.

*Wildermuth, supra* at 260.

In its efforts to effectuate the legitimate intent of protecting the elderly from youthful offenders, the legislature reasonably classified the group of offenders to which § 9717 would be applied on the basis of their age and relative youthfulness to their victims. The classifications of § 9717 and § 9718 are not arbitrary or capricious, but reasonable and the classification "rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike," *Moyer, supra* at 401, 341 A. 2d at 443. Therefore, there is no equal protection violation.

Furthermore, the Pennsylvania lower courts in deciding appellant's equal protection challenge relied solely on Pennsylvania state authority and precedent. Since the Pennsylvania state courts' judgment rests on an adequate non-federal basis there is no substantial federal question at issue, and this appeal should be dismissed.

## CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that this appeal be dismissed, or in the alternative, this Court should affirm the judgment of the Supreme Court of Pennsylvania which dismissed this appeal as improvidently granted.

Respectfully submitted,

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